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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

CASE NO:

GEORGE V. SMITH,
Petitioner

vs,

ORANGE COUNTY PUBLIC SCHOOLS, ET AL,
Appellees.

Circuit Court No:
06-16624-DD
District Court No:
6:04-CV-1811-ORL-28

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

STATEMENT 1

Defendant filed a motion for summary judgment at the end of the period allotted for discovery. The supporting documentation clearly showed that Plaintiff and the EEOC had been lied to about Plaintiff having been terminated, but was instead illegally and arbitrarily "resigned" by the school board. The document had been sought through public records request, sub poena duces tecum, and request for production. Defendant resisted all legal attempts for Plaintiff to see the document prior to the motion for summary judgment. The arbitrary resigning of Black employees was one of many activities designed by the school board to artificially keep the number of Blacks within the lower range of guidelines acceptable in the Desegregation Order under which defendant operated. Small numbers of Blacks were removed under various plans so as to be undetected by the Justice department. Defendant was permitted to violate all discovery rules. In support of the motion for summary judgment, Defendant presented an affidavit that on its face was contradicted by the attached evidence.

QUESTION 1

Whether – the court below "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power", and contrary to the decision below but consistent with the decisions of this Supreme Court and decisions previously from the appealed district Court– the Constitution Right to Due Process requires Pro Se Plaintiff must

be allowed discovery and amendments according to the Rules and under Rule 56 be given either a hearing date or a date certain at least 10 days prior to the district court taking a motion for summary judgment under advisement and therein granting the motion.

STATEMENT 2

Plaintiff Pro-Se was forced to dismiss his attorney six months into the proceeding. The attorney had never served a notice of appearance nor filed any papers in the proceedings. The court issued an order stating that Plaintiff could only have an attorney to represent him in total. Plaintiff Pro-Se located 3 civil rights attorneys that stated they were too busy to handle the case, but would assist Plaintiff Pro-Se with discovery matters as long as Plaintiff Pro-Se agreed to have them represent Plaintiff Pro-Se before the court only for trial and immediate activities related to the trial. Plaintiff Pro-Se filed a motion seeking permission for this intermittent representation and the lower Court denied the motion.

QUESTION 2

Whether -- contrary to the decision below but consistent with the decisions of previous Supreme Court decisions and Federal Rules of Civil Procedure – Pro Se Plaintiff in a Racial Discrimination suit can be allowed intermittent representation as assistance with discovery.

STATEMENT 3

Plaintiff Pro-Se was denied discovery requests by the district court through magistrate orders. Neither in the Case Management Order nor on the form for magistrate orders was there any notification that Pro Se Plaintiff would waive the Due Process right to appeal lower court orders unless he objected to the presiding Judge himself within 10 days. In the absence of such a statement, Plaintiff Pro-Se believed the Rule referred only to defects, e.g.: wordings confusing, ambiguous, or completely left out, which confused the meaning of the order.

QUESTION 3

Whether – the court below "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the lower court, as to call for an exercise of this Court's supervisory power", and contrary to the decision below but consistent with the decisions of this Supreme Court and decisions previously from the appealed district Court– the Constitution Right to Due Process – can Pro-Se Plaintiff in a Racial Discrimination suit appeal magistrate discovery orders which show no defect, but are perceived by Pro-Se Plaintiff as being wrong.

TABLE OF CONTENTS

I. Citation of Orders page v.

II. Jurisdiction page vi.

III. Authorities in Alphabetical Order page vii & viii.

IV. Statement of Case page 1 -3.

V. Text of Petition pages 3 - 11.

VI. Summary page 12.

VII. Certificate Of Compliance page ix.

VIII. Certificate Of Service page ix.

IX. Appendix

A. Page viii. - Authorities in Alphabetical Order

B. Page ix - .Lower Orders in Entirety

I. CITATION OF ORDERS

Order granting summary judgment. 11/21/06

Order entering judgment. 11/24/06

Opinions in Affirmation of Court of appeals. 06/04/07

1. Appellant waived his right to appeal orders denying discovery with Plaintiff having been denied all material discovery by the district court.

2. Appellant's request for leave to amend prior to summary judgment was untimely and properly denied.

3. Appellant was not entitled to a notice of a date certain for taking Summary Judgment under advisement.

4. Affirmation without opinion of the district court's denial of Plaintiff's request to use intermittent counsel.

Denial of Petition for Rehearing. 07/23/07

II. JURISDICTION

The **United States Court Supreme Court** has jurisdiction over the actions of lower court judges and the 11th Circuit Court of Appeals. The Re-Hearing was denied on July 23, 2007 and this petition is timely filed with this Supreme Court by mail on October 22, 2007.

The **United States Court of Appeals Eleventh Circuit** has jurisdiction over the actions of lower court judges in the middle Florida district.

The Constitutional Considerations this Court is being asked to consider are only those of representation and due process.

III. Authorities in Alphabetical Order

Ackerman v. Lauver
242 N.W. 2d 342..... 3

Dulansky v. Iowa-Illinois
92 F.Supp 118..... 8

Griffith v Wainwright,
772 F.2d 822, 825, 826..... 7

Hatcheries v. Lindley
13 FRD 113..... 8

Herron v Beck
693 F.2d 125 (1982)..... 8

Johnson v. Zerbst
304 U. S. 458 (1938)..... 9, 10

Jones & Laughlin Steel
750 F.2d 1214 (1984)..... 9

Levald, Inc. v. City of Palm Desert
998 F.2d 680..... 3

Milburn v United States,
734 F.2d 762, 765 (1984)..... 7

Miranda v. Arizona,
384 U. S. 436, at 475..... 10

Peterson v. John Hancock Mut. Life Ins. Co.
143 F.2d 869 (1944)..... 6

Palko v. Connecticut,
302 U. S. 319, 325..... 11

Powell v. Alabama,
287 U. S. 45, 68, 69..... 9

Sartor v Arkansas Natural Gas Corporation
321 U. S. 724, at 728 and 129..... 5

STATEMENT OF CASE

Appellant was hired by Orange County Public Schools in August of 2000. Thirty days on the job Plaintiff was told he was being terminated without cause and without reason. Plaintiff was told by written memo that this was authorized by statute. Requests to an assistant superintendent and the school board chairman received no statement of reason for the termination.

Appellant, who is Black and at the time 52 years of age, filed a complaint with the EEOC. Orange County Public Schools responded to the EEOC by saying that Appellant was fired for causes which did not exist in September of 2007. Although the statute referenced by Orange County Public Schools stated that this termination must be "without cause," the EEOC ruled that Orange County Public Schools had the right by statute to terminate and refused to investigate farther.

Since the statute defines termination without cause, such as hiring too many teachers, there exists no statute barring the rehiring. Moreover, a reading of the policies show that Orange

County Public Schools has refused to create a policy to incorporate the referenced statute but has made policy that terminations can only be done "with cause." Appellant, therefore, a qualified Math instructor in an area that complains publicly that it has difficulty in finding Math instructors, applied for a teaching position.

Defendant refused without reason given to hire Appellant. Defendant has hired both Black and White employees who were genuinely terminated without cause by other counties. Defendant has hired employees who were terminated for cause from other counties where the cause did not deal with moral turpitude.

Appellant filed a complaint in 2003 with the EEOC for retaliation. Orange County Public Schools responded with the identical response as in 2000. The EEOC granted a right to sue with no ruling. Appellant filed a complaint with the district court in 2004 Pro-Se, close to the last moment as his retained

counsel had not done so. Appellant incurred many problems with counsel that must remain privileged. However, Appellant was forced to dismiss the attorney who at the time had filed no papers nor represented Appellant before the court in any manner. The attorney sought permission from the court to leave and in granting permission the court instructed Appellant that should he hire another attorney, he could not proceed pro-se.

TEXT OF PETITION

QUESTION 1

Plaintiff Pro-Se was made aware only with the service of the motion for summary judgment that Defendant had never voted to terminate him as required by statute and its incorporated policy thereto. Instead, Orange County Public Schools only voted to accept a resignation that had never been tendered. Upon receipt of the document, Plaintiff Pro-Se, attempted to amend his complaint with the new found information. In the affirmation, the appeal court ventured far

from the precedents of Ackerman v. Lauver, 242 N.W. 2d 342, and Levald, Inc. v. City of Palm Desert, 998 F.2d 680. Levald on page 691 [23] specifically states: "...the outright refusal to grant the leave...is an abuse of that discretion and inconsistent with the spirit of Federal Rules." The purpose of the rule for allowing amended complaints is that Plaintiffs may amend for violations to the law found before the trial.

In the instant case Plaintiff did not know the actual nature of his termination having been attributed to a "voluntary resignation". This was revealed in an attachment to the motion for summary judgment which had been sought through previous and resisted discovery. Plaintiff having only one bite at the apple must be allowed to amend his complaint. The sworn affidavit attached to the motion for summary judgment falsely swears that the attached document showed that plaintiff had been terminated and that he was refused hiring because of the termination. Plaintiff's name therein does not appear among the terminations. Plaintiff's name only appears as a resignation,

where plaintiff never resigned nor offered any resignation. It is plaintiff's position that this procedure of "arbitrarily resigning" Black employees is a calculated procedure to reduce the number of Black employees without allowing due process as required by a termination, and to escape notice by the supervisory Court of Discrimination against Black employees since the number in this act alone is relatively small. The Defendant is under a consent agreement to not practice Racial Discrimination.

Plaintiff's assertion that this information was hidden until the delivery of the motion for summary judgment should have been accepted as good cause for amendment or the court should have conducted a hearing to see if the information had been truly hidden and whether plaintiff had acted with due diligence to discover the information. Instead, the lower court just assumed that the information had been readily available to plaintiff and refused to allow the amendment. **This is an abuse of discretion.** In the absence of a hearing, plaintiff's statement that the information was hidden until the delivery of the motion

for summary judgment was good and sufficient cause to freely allow the amendment. Dussouy v. Gulf Coast Inv. Corp. 660 F.2d at 597- 598 states: "56 *evinces a bias in favor of granting leave to amend. The policy of the federal rules is to permit liberal amendment to facilitate determination of claims on the merits and to prevent litigation from becoming a technical exercise in the fine points of pleading.*"

The appealed court showed a disinterest in the appeal. It stated that it took a de novo view of the motion for summary judgment. However, it refused to acknowledge the contradiction between the sworn affidavit that Plaintiff had been terminated and the attached official record of separation as a resignation. This is a matter material to determine whether Plaintiff was discriminated against. Where there is a conflict in material facts, the jury must decide. Likewise the affidavit states, "It is my personal policy..." This raises the question as to whether an officer for a state agency can act on his own "personal policy" rather than the policy approved by the agency. Again that is a

matter for the jury. Sartor v Arkansas Natural Gas Corporation 321 U. S. 724, at 728 and 729 requires that the facts be quite clear.

Had Plaintiff been delivered a 10-day notice, plaintiff would have sought a continuance until defendant complied with the court's order compelling production. Plaintiff could have then produced a proper response with supporting documents that had the correct foundation laid. Likewise, in a proper response plaintiff could have pointed out the impropriety in both the affidavit and supporting documents, which on the face do not meet the standards of Peterson v. John Hancock Mut. Life Ins. Co. 143 F.2d 869 (1944).

Rule 56 requires a date certain and not only allows plaintiff to supply his response before that date, but to ask for a continuation, and to request hearings on other pertinent information before that date. The rule is clear in that it wishes parties to have ample opportunity to prepare a proper response. As in Milburn v United States, 734 F.2d 762, 765 (1984), which

was remanded by this appealed from court, "The record in this case nowhere indicates that ..." Plaintiff was "...given a 10-day notice...that the court **would** take the government's motion under advisement as of a **certain date**." The appealed court maintains that the objected to case management report specifies a time period with terms such as "unless," "could," and "may." No where is there a statement that on November 15, 2006 or any other certain date, the court shall take the motion for summary judgment filed in this case under advisement."

Griffith v Wainwright, 772 F.2d 822, 825, 826 **again remanded by this appealed court**, is more precise and specific. Griffith states: "...that an adverse party must be given express, ten-day notice of the summary judgment rules... **and of the consequences of default**." "As in such cases, as in that before us today, '**a court should be particularly careful to ensure proper notice to a pro se litigant**...so that any rights that such a litigant might have will not be extinguished merely through failure to appreciate the subtleties of modern motion practice." "We think

it clear from the inadequacies of Appellant's responses that he was not given notice proper under Rule 56(c)." The same appealed court previously ruled in Herron v. Beck 693 F.2d 125 (1982), remanded, "Moreover, a court should be particularly careful to ensure proper notice to a *pro se* litigant. In addition, the ... notice must be sufficiently clear to be understood by a *pro se* litigant and calculated to apprise him of what is required under Rule 56." In the instant case, 2 days prior to the granting of the motion Plaintiff filed a motion to compel previous ordered to be produced documents.

The appealed court in affirmation sanctioned the lower court's acceptance of responses to discovery requests explicitly prohibited in: Sieb's Hatcheries v. Lindley 13 FRD 113, Dulansky v. Iowa-Illinois 92 F.Supp 118, and many other discovery rulings noted in the appeal. The sheer volume of denied discovery and paucity of permitted discovery calls for the supervisory power of this court.

QUESTION 2

The fact that due process requires representation is not of question. The precedent currently applied to Racial Discrimination cases is Jones v. Jones & Laughlin Steel 750 F.2d 1214 (1984). In Jones the 3rd circuit court of appeals stated that not only did plaintiff have a right to hire an attorney, but also to amend his complaint, and **seek additional time for discovery with the assistance of his attorney.**

In affirming the denial of representation, the appealed court ignored Mr. Justice Black on 463 of Johnson v. Zerbst 304 U. S. 458 (1938) stated: "The '...right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the scien e of law. (Powell v. Alabama, 287 U. S. 45, 68, 69) He requires the guiding hand of counsel at every step in the proceedings against him.'..." In the instant case, the lower court has denied Appellant counsel and

then the appealed court has stated that he "waived" rights by not taking actions of which counsel would have apprised him.

QUESTION 3

The right to appeal is a constitutional right. This court must be mindful that plaintiff was denied all material discovery by the magistrate. The attempt by the appeal Court to designate the magistrate as a court lower to district court is absurd. The rule states that defects must be addressed within 10 days. That is to prevent the defect from being argued at a time when it can not be corrected. A ruling by a magistrate clear in its decision and requiring no action cannot be defective. It is a ruling of the Court. The appealed court stated that Plaintiff "waived" his due process right to an appeal. The appeal Court has declined to review discovery orders stating that Appellant "waived" his right to a review. This United States Supreme Court has always disagreed with this position. In Miranda v. Arizona, 384 U. S. 436, at 475, Mr. Chief Justice Warren States: "This Court has

always set high standards for the waiver of constitutional rights, Johnson v. Zerbst, 304 U. S. 458 (1938)..."

In Johnson, Mr. Justice Black stated of the Sixth Amendment, and, no less can be said of the other Amendments, "...stands as a constant admonition that if the constitutional safeguards it provide be lost, justice will not "still be done." He references Palko v. Connecticut, 302 U. S. 319, 325. He then states, on 464 of Johnson: "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' **A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.**"

Summary

While this court cannot investigate whether defendant actually is intentionally lowering the number of employees by Race, Petitioner should be allowed to properly discover evidence and

present his case before a jury. Petitioner has been denied due process in violation of the discovery rules, rule 56 and precedents, by being denied the assistance of an attorney that would appear intermittingly, by not having discovery precedents applied on his behalf, and by not having compliance by either courts below with Rule 56 or the circuit court's own precedence of providing an express 10 day notice with an ***identifiable date certain*** prior to granting summary judgment as required by rule and precedents. The rule clearly provides for Plaintiff to have requested a continuance to enforce the Court's Production Order and have this information to respond to the motion.

The sheer volume of denied application of precedents in this case calls for the supervisory power of this court. Plaintiff Pro-Se received not one ruling that agreed with the precedents by either courts of appeal or this Supreme Court. There remains nowhere else Petitioner can go to acquire a fair trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been delivered by U. S. Mail on the 21st day of March 2008, to the Firm of Rumberger, Kirk & Caldwell, P.A., 300 S. Orange Avenue, Suite 1400, Orlando, Fl 32801 and to Judge David Baker at the George C. Young US Courthouse 80 N. Hughey Avenue, Orlando, FL 32801-2278.

George V. Smith

George V. Smith

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition complies with the typing Rule for the United States Supreme Court. The Text of the petition contains 13 pages which includes 2,127 words.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 21, 2008.

George V. Smith

George V. Smith